Supreme Court, U.S.
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No. 88-1899

In The

Supreme Court of the United States

October Term, 1988

STEVEN LEVINE,

Petitioner,

v.

CHIEF JUSTICE NATHAN S. HEFFERNAN,
JUSTICE SHIRLEY S. ABRAHAMSON,
JUSTICE WILLIAM A. BABLITCH,
JUSTICE WILLIAM G. CALLOW,
JUSTICE LOUIS J. CECI,
JUSTICE ROLAND B. DAY,
JUSTICE DONALD W. STEINMETZ

and

STATE BAR OF WISCONSIN and STEPHEN L. SMAY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE COMPULSORY BAR MEMBERSHIP REQUIREMENT CANNOT BE JUSTIFIED BY ACTIVITIES ON WHICH THE BAR DOES NOT SPEND ANY OF THE COMPULSORY DUES 1

II. IN THE ABSENCE OF A STATE BAR ROLE IN THOSE REGULATORY ACTIVITIES CITED WITH APPROVAL IN *LATHROP*, THE ISSUE IS WHETHER OTHER STATE BAR ACTIVITIES SUPPORTED BY THE COMPULSORY DUES JUSTIFY THE MANDATORY MEMBERSHIP REQUIREMENT 4

III. TRADITIONAL FIRST AMENDMENT ANALYSIS APPLIES TO THE MANDATORY BAR MEMBERSHIP REQUIREMENT 5

IV. REMAND FOR AN EXAMINATION OF INDIVIDUAL BAR EXPENDITURES WOULD MERELY DUPLICATE WHAT THE DISTRICT COURT HAS ALREADY DONE 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 7

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 7

Ellis v. Railway Clerks, 466 U.S. 435 (1984) 7, 8

Hollar v. Government of the Virgin Islands, 857 F. 2d 163 (3d Cir. 1988) 5

Lathrop v. Donohue, 367 U.S. 820 (1961) 1, 2, 3, 5

Levine v. Heffernan, 864 F. 2d 457 (7th Cir. 1988) 4, 9

Levine v. Supreme Court of Wisconsin, 679 F. Supp. 1478 (W.D. Wis. 1988) 4, 6

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 7

Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D. Puerto Rico 1988) 6

ARGUMENT

I. THE COMPULSORY BAR MEMBERSHIP REQUIREMENT CANNOT BE JUSTIFIED BY ACTIVITIES ON WHICH THE BAR DOES NOT SPEND ANY OF THE COMPULSORY DUES.

Respondents continue to defend the collection of mandatory state bar dues – and to rely on *Lathrop v. Donohue*, 367 U.S. 820 (1961) – by citing regulatory, educational, and ethical activities of the bar which were cited with approval by this Court in *Lathrop* but which are not now financed by the mandatory dues.

The largest portion of respondent Wisconsin Supreme Court justices' brief (pp. 7-18) entitled "The State Bar's Activities in the Areas of Attorney Education and Discipline have not Significantly Changed Since *Lathrop v. Donohue*" is devoted to a discussion of the bar's roles in attorney continuing legal education and ethics. The idea apparently is to show that the bar still engages in the important regulatory functions cited with approval by this Court in *Lathrop* and that therefore *Lathrop v. Donohue* is still binding precedent, as found by the court of appeals.

What the text of the justices' brief does not say is that these functions are not funded in any way by the compulsory dues they seek to justify. Only hidden away in the last sentences of footnotes 4 and 9 are the admissions that the dues they seek to continue to collect are not used to fund the very educational and ethical activities cited by the justices to justify continued collection of those dues.

The brief of respondent State Bar is similar to the justices' brief in this regard. For example, the bar states, " . . . the present structure, purposes, and activities of the integrated bar are not substantially different from its predecessor." (bar brief, p. 13) And "While petitioner emphasizes the separate funding of ATS-CLE programs, the essential educational activities approved in *Lathrop* continue to be financed by the State Bar. Similarly, the State Bar's participation in ethics has not changed substantially since *Lathrop*." (bar brief, pp. 20, 21) But, as does the justices' brief, the bar seeks to rely on activites not funded by the compulsory dues it seeks to defend. Only in fn. 9 of the bar's brief, for example, is it admitted that the Client Security Fund is not funded by those dues, but by a separate assessment.

Respondents' attempt to rely on activities not funded by the compulsory dues to justify collection and use of those dues for other purposes is illogical and was rejected by the district court:

> Since the Supreme Court's decision in *Lathrop*, however, the character of the State Bar of Wisconsin has changed from what was presented to the Court. In 1976, the Wisconsin supreme court created the Board of Attorneys Professional Responsibility and the Board of Attorneys Professional Competence to administer lawyer discipline and bar admission requirements, with their financial support derived from assessments on all Wisconsin lawyers separate from the mandatory membership dues. In 1977, the state supreme court required the Bar's ATS-CLE continuing legal education programs to be completely self-supporting. See *In re Regulation of the Bar*, 81 Wis.2d xxxv, xli (1977). It is no longer the case that membership dues support the activities that gave the Bar its quasi-public character in *Lathrop*.

> The bar's membership dues do not support directly continuing legal education, lawyer discipline, or matters relating to bar admission standards. The Wisconsin supreme court has appointed special bodies to regulate these matters. Nor are other concededly important regulatory concerns funded by bar membership dues. By supreme court rule, special assessments apart from bar dues are levied against attorneys to maintain the Client Security Fund, a fund used to reimburse losses caused to the public by dishonest lawyers. . . .
>
> . . . The membership dues that plaintiff is challenging are not the payments he is required to make to support the Boards of Attorneys Professional Responsibility and Competence, but those that support the variety of other activities sponsored by the bar. (679 F. Supp. at 1493, 1501)

The fact that the compulsory bar dues do not support the educational and ethical functions cited by this Court in *Lathrop* is not a mere "argument" of petitioner, as respondents suggest. It is the finding of fact and conclusion of the district court, now admitted in the brief of respondent justices, albeit by footnote. This case does not involve a challenge to the special assessments which support those educational and ethical "regulatory" activities, which petitioner gladly pays. Respondents' argument that activities not supported by state bar dues justify the collection of those dues is like a compulsory union arguing that its bargaining duties justify the collection of monies not used to support collective bargaining.

This case presents the important First Amendment issue of whether the state may force petitioner to pay membership dues to a bar which does not use that money to support those functions "that gave the bar its quasi-

public character in *Lathrop*." 679 F. Supp. at 1493. It is an important issue meriting a grant of certiorari.

II. IN THE ABSENCE OF A STATE BAR ROLE IN THOSE REGULATORY ACTIVITIES CITED WITH APPROVAL IN *LATHROP*, THE ISSUE IS WHETHER OTHER STATE BAR ACTIVITIES SUPPORTED BY THE COMPULSORY DUES JUSTIFY THE MANDATORY MEMBERSHIP REQUIREMENT.

In the absence of a state bar role in any regulatory, educational, and ethical activities performed by the bar which are supported by the compulsory dues, respondents – like the court of appeals – argue that other bar activities justify continued collection of mandatory dues.

The court of appeals went so far as to chastise the district court for the sin of overemphasizing "the importance of the bar's roles in the areas of continuing legal education and attorney discipline to the *Lathrop* court." *Levine v. Heffernan*, 864 F. 2d 457, 462 (7th Cir. 1988). The court of appeals concluded that other bar activities such as "engaging in public relations and funding studies of programs designed to further the economic wellbeing of the profession" played just as great a role in the *Lathrop* Court's validation of the compulsory bar as the bar's educational and ethical activities. *Id.* at 462, n. 11. The district court concluded, however: "In the context of the balancing test, and in light of the union shop cases, I cannot find that these activities or the whole host of other Bar activities constitute a compelling state interest." *Levine v. Supreme Court of Wisconsin, supra*, 679 F. Supp. at 1501.

Today, in addition to the absence of a bar role supported by the compulsory dues in any regulatory, educational or ethical activities, the bar engages in numerous expressive activities characteristic of a private, professional association. (Please see Petition for Writ of Certiorari, pages 4, 5, and 12.) The important question presented for review in this case is whether, in the absence of those educational and ethical activities relied on by the *Lathrop* Court, the bar's current activities and expenditures justify the mandatory dues payment requirement. It is an important issue meriting a grant of the petition for certiorari.

III. TRADITIONAL FIRST AMENDMENT ANALYSIS APPLIES TO THE MANDATORY BAR MEMBERSHIP REQUIREMENT.

Respondent State Bar of Wisconsin argues that traditional First Amendment analysis – including the compelling state interest test – has never been applied to either compulsory union or compulsory bar membership requirements, although the test has been applied to specific expenditures of compulsory membership organizations. The bar – like the court of appeals – argues that no other court has found the mere bar membership requirement to be unconstitutional, although specific expenditures have been held unconstitutional using traditional First Amendment analysis. These arguments misperceive what the district court did in this case.

This is not a case where the district court looked only at the organization and structure of the bar, as occurred in *Hollar v. Government of the Virgin Islands*, 857 F. 2d 163

(3d Cir. 1988), where the court specifically stated that only a "facial" challenge to the bar's constitutionality was involved. *Id.* at 166, 168.

In the present case the district court's conclusion that the mandatory bar requirement is unconstitutional was not based on a consideration of only the structure or concept of the mandatory bar. The court's conclusion that mandatory membership in the State Bar of Wisconsin violates the First Amendment was based on a detailed inspection of the activities on which state bar dues are and are not spent – and on a finding that none of the activities on which the dues are spent constitute compelling state interests. *Levine v. Supreme Court of Wisconsin,* 679 F. Supp 1478, 1501 (W.D. Wis. 1988).

Thus, this case is similar to *Schneider v. Colegio de Abogados de Puerto Rico,* 682 F. Supp. 674 (D. Puerto Rico 1988), in which the district court scrutinized the individual expenditures of the Puerto Rico bar and concluded that many did not meet the compelling state interest test. Respondents do not contest that the compelling state interest test applies to individual bar expenditures.

The district court found that none of the State Bar of Wisconsin's expenditures met that test, therefore, the entire mandatory dues requirement was unconstitutional. The court of appeals erred in rejecting that test in favor of the legitimate state interest test.

Finally, respondents' argument that the compelling state interest test has not been applied by this Court to "entire" membership requirements – only to individual expenditures – flies in the face of a number of decisions:

E.g. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984):

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

The same test applies in the compulsory union membership context, with the compelling state interest being the governmental interest in industrial peace:

> . . . by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. "To be required to help finance the union as a collective bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." Id., at 222, 52 L Ed 2d 261, 97 S Ct 1782. It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.

Ellis v. Railway Clerks, 466 U.S. 435, 455, 456 (1984) citing *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977). See also *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302, 303 (1986).

Whether the issue is considered to be the mandatory bar membership requirement as a whole, or the totaling of the bar's individual expenditures, the compelling state interest test was correctly applied by the distict court and rejected by the court of appeals.

IV. REMAND FOR AN EXAMINATION OF INDIVIDUAL BAR EXPENDITURES WOULD MERELY DUPLICATE WHAT THE DISTRICT COURT HAS ALREADY DONE.

Both respondent justices and the state bar argue that petitioner's petition for certiorari is premature and should be denied so that this case can be remanded to the district court for further proceedings. This argument, again, misperceives the nature of the district court's decision.

Petitioner's complaint requested the district court to inspect all activities on which the state bar spends its compulsory dues and to determine which, if any, could be considered "compelling state interests." Petitioner requested the court to apportion the total amount of dues collected between compelling state interests and other bar activities, with the bar limited in the future to collecting only that percentage of the dues spent on compelling state interests. This process is similar to the process used in the case of compulsory unions to separate dues spent for collective bargaining purposes from dues monies spent on other activities, as in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

The district court found that none of the activities on which the bar spends the compulsory dues constitute compelling state interests, and therefore that court invalidated the entire compulsory bar dues requirement. Its finding that the compulsory membership requirement is unconstitutional was not based only on the structure and organization of the bar, but on an analysis of the specific activities on which the bar spends the compulsory dues.

The court of appeals, however, described the district court's decision as invalidating a "mere compulsory dues requiremen[t]," as opposed to invalidating a specific bar expenditure. *Levine v. Heffernan*, 864 F. 2d 457, 461 (1988). The court of appeals concluded that the "legitimate state interest" test applies in the former case, while the "compelling state interest" test applies in the latter. *Id.* at 461, 462. Respondents apparently seize on this distinction in suggesting that this case be allowed to be remanded to the district court for a consideration of state bar expenditures under the "compelling state interest" test.

But such a remand would be a senseless repetition. The district court has already considered the entire panoply of state bar activities supported by the compulsory dues and concluded that none constitutes a compelling state interest. As the district court found (679 F. Supp. at 1493, 1501), those regulatory, educational, and ethical activities specified by the Wisconsin supreme court as compelling state interests (See 112 Wis.2d at xxi, 334 N.W.2d at 546) are supported by assessments and other monies entirely separate from state bar dues. As the brief of amicus curiae states, the constitutionality of a "mere compulsory dues requirement" cannot be separated from strict scrutiny of the activities which those monies are used to support.

The district court has already performed that analysis and found that present-day state bar activities which are supported by the compulsory dues do not meet the compelling state interest test.

CONCLUSION

The court of appeals incorrectly refused to base its decision on an analysis of the State Bar of Wisconsin's current activities which are supported by the mandatory dues under the traditional First Amendment tests set forth by this Court. The petition for certiorari should be granted and the court's decision reversed.

Respectfully submitted,

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